

FCPA Resource Guide, Second Edition: What You Need To Know

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Anti-corruption/FCPA and White Collar Defense and Investigations

On July 3, 2020, the U.S. Department of Justice's ("DOJ" or the "Department") Criminal Division and the U.S. Securities and Exchange Commission's ("SEC") Enforcement Division quietly released *A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition* (the "Second Edition"). The first edition of the *Resource Guide* (the "First Edition") was released in November 2012 and has served as an important reference tool for Foreign Corrupt Practices Act ("FCPA") practitioners and compliance professionals. Like the First Edition, the Second Edition remains non-binding, informal guidance on DOJ's and the SEC's positions on a variety of issues arising under the FCPA.

The Second Edition is largely an update of the original. The revisions generally incorporate developments in the FCPA space in the last eight years, rather than attempt to break new ground. Indeed, with the exception of clarifications on DOJ's views of standards applicable to criminal FCPA accounting provisions charges, the Second Edition primarily catalogues and incorporates recent case law, provides updated practical examples based on more recent enforcement actions, and incorporates policies and concepts from various guidance documents released by DOJ in recent years, including the [Policy on Coordination of Corporate Resolution Penalties](#) (the "Anti-Piling On Policy"), the [FCPA Corporate Enforcement Policy](#), the [Selection of Monitors in Criminal Division Matters](#), and the [Evaluation of Corporate Compliance Programs](#).

In this sense, while the Second Edition will be a useful reference guide, it does not offer any major policy or positional shifts that would cause organizations fundamentally to re-think how they approach various aspects of their anti-corruption compliance programs. Accordingly, organizations that are already updating their compliance programs to incorporate recent DOJ guidance and learnings from enforcement actions since the First Edition should find themselves well-positioned to meet DOJ and SEC expectations regarding their programs. Indeed, the publication of the Second Edition is a timely reminder that even during a time of global economic disruption, FCPA enforcement will march on and companies should continue to review, test, and enhance their anti-corruption compliance programs.

Below we summarize the key revisions in the Second Edition.

1. The Second Edition Makes Clarifications Regarding Criminal Violations of the Accounting Provisions

Among the most notable revisions in the Second Edition are DOJ's clarifications regarding the statute of limitations and scienter standards for criminal violations of the FCPA's accounting provisions. For practical purposes, we do not believe that these clarifications will have a

substantial impact on corporate enforcement activities or how companies approach their compliance programs.

A. The Statute of Limitations Is Six Years

The First Edition stated that the statute of limitations for both the FCPA's anti-bribery and accounting provisions was five years in criminal cases, pursuant to the general statute of limitations period set forth in 18 U.S.C. § 3282. The Second Edition now points to a statute – 18 U.S.C. § 3301 – that sets forth a six-year statute of limitations period for criminal violations of the FCPA's accounting provisions. The statutory basis for the claim leaves little to question: in particular, § 3301 applies a six-year limitations period to “securities fraud offense[s],” including, specifically, the FCPA's accounting provisions.

Section 3301, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act a decade ago, has not been subject to recent amendment or relevant case law that would cause DOJ to revise its position in this area. Whatever led to this clarification, as a practical matter, its impact may be limited. The one-year difference in the applicable statute of limitations for criminal FCPA accounting provisions matters is likely to have little impact in the context of negotiated corporate resolutions, in which statutes of limitations may be extended subject to tolling agreements or for other reasons.

B. Criminal Violations by Companies Require Willfulness

The Second Edition clarifies that both companies and individuals must act “knowingly and willfully” as a predicate for a criminal enforcement action under the FCPA accounting provisions. The First Edition left unclear whether corporations also were subject to a “willfulness” requirement – *i.e.*, knowledge that one's conduct is unlawful. This clarification likely will not affect the vast majority of cases, as the statute already makes clear that it is a crime to “knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account.” Where such conduct has occurred, DOJ usually will have evidence, or at least infer, that the company or individual knew that the conduct was unlawful. For those cases, however, where a company or individual did not know that the conduct was unlawful, in theory DOJ should not pursue enforcement under the criminal accounting provisions.

2. The Second Edition Suggests That the SEC Will Continue to Take an Expansive View of What Constitutes “Internal Accounting Controls”

As we observed in our [2018 Year in Review](#), in recent years we have noted a trend of SEC enforcement actions addressing control deficiencies in areas that are not traditionally viewed as internal accounting controls, such as controls over procurement, hiring, and third-party due diligence. While questions have been raised over whether the internal accounting controls provision was intended to reach such control deficiencies, we have previously advised that issuers are well-served to consider the SEC's expansive view in the design, implementation, and maintenance of their internal control frameworks and anti-corruption compliance programs.

The Second Edition further supports this view. It explains that “[a]lthough a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls.” The updated guidance goes on to call for internal accounting controls that are “tailored” to a company's risk profile, stating that “the design of a company's internal controls must take into account the operational realities and risks

attendant to the company's business," such as "the nature of its products or services"; "the extent of its government interaction"; and "the degree to which it has operations in countries with a high risk of corruption."

The Second Edition does not address the statutory basis for this expansive view of the internal controls provision. While it is undoubtedly good practice for internal accounting controls to address "operational realities and risks," this seems to go beyond the requirements of the "reasonable assurances" standard and the four specific control areas set forth in 15 U.S.C. § 78m(b)(2)(B). That said, unless and until the reach of the internal accounting controls provision is litigated, we expect that we will continue to see aggressive use of this provision by the SEC. Accordingly, issuers should continue to focus on implementing and maintaining controls that are tailored to their corruption risk profile, and on ensuring that their anti-corruption policies and procedures are integrated into their internal control frameworks.

3. The FCPA's Jurisdictional Reach Under Conspiracy and Accomplice Liability Theories Will Likely Remain the Subject of Litigation for the Foreseeable Future

The First Edition reflected DOJ's long-standing, expansive interpretation of FCPA jurisdiction under which a foreign person or entity could be liable for conspiring with or aiding and abetting a person or entity within the FCPA's jurisdictional reach in the commission of an anti-bribery violation, even if the conspirator or accomplice was not independently subject to FCPA jurisdiction.

The Second Edition continues to advance expansive views of conspiracy and accomplice liability, while acknowledging that such theories were dealt a significant blow by the Second Circuit in *United States v. Hoskins*.¹ In that case, which we covered in a previous [advisory](#), the Second Circuit held that the government may not employ conspiracy or accomplice liability theories to bring charges against foreign defendants that do not fall within the FCPA's explicit categories of covered persons. Although the Second Edition acknowledges this limitation, it cabins the *Hoskins* decision to the Second Circuit and highlights the 2019 decision in the District Court for the Northern District of Illinois in *United States v. Firtash*.² In *Firtash*, the district court declined to follow the Second Circuit's reasoning as contrary to Seventh Circuit precedent on conspiracy and accomplice liability, and declined to dismiss FCPA charges against foreign nationals alleged to have engaged in wrongful conduct exclusively outside of the United States and who would not otherwise be subject to anti-bribery jurisdiction under the FCPA.

Not surprisingly, DOJ is sending a strong signal that it will continue to advance expansive theories of conspiracy and accomplice liability, notwithstanding the setback it experienced in *Hoskins*.

Finally, the Second Edition notes that any limitations imposed by *Hoskins* in the context of anti-bribery violations do not affect conspiracy and accomplice liability for violations of the accounting provisions, as the latter apply to "any person" rather than a limited group of covered persons.

¹ 902 F.3d 69 (2d Cir. 2018).

² 392 F. Supp. 3d 872 (N.D. Ill. 2019).

4. The Second Edition Acknowledges Recent Limitations to the Disgorgement Remedy, but Leaves Key Questions Unanswered

The Second Edition incorporates recent U.S. Supreme Court case law constraining the SEC's disgorgement authority. As we [covered](#) previously, the Court held in *Kokesh v. SEC* that disgorgement is a penalty subject to a five-year statute of limitations under 28 U.S.C. § 2462.³ The Second Edition reflects the Court's unanimous holding in *Kokesh*, stating that in civil actions by the SEC, the five-year statute of limitations applies to claims for disgorgement.

The Second Edition also – at least superficially – tackles the Court's recent decision in *Liu v. SEC*.⁴ We recently [covered](#) that decision and the many questions that remain in its wake. The Second Edition acknowledges the Court's decision in just a single sentence, reflecting that the Court held that “disgorgement is permissible equitable relief when it does not exceed a wrongdoer's net profits and is awarded for victims.” Given the considerable uncertainty that exists following the *Liu* decision – including about how the SEC will interpret and apply its holding, not only in civil actions but also in administrative proceedings – the Second Edition is unlikely to be the last word from the SEC in this area, with the disgorgement remedy likely to be the subject of continuing debate and litigation.

5. The Second Edition Incorporates the *Esquenazi* Factors to Define “Instrumentality” for Purposes of Identifying Foreign Officials

The Second Edition incorporates more recent case law on the term “instrumentality” for purposes of identifying “foreign officials” under the anti-bribery provisions. The FCPA defines “foreign official” to include, among other things, any officer or employee of an “instrumentality” of a foreign government, but the statute does not define the latter term. Like the First Edition, the Second Edition continues to make clear that the “term ‘instrumentality’ is broad and can include state-owned or state-controlled entities.” Whether or not an entity is an instrumentality of a foreign government has been an issue vigorously contested both in court and at the conference table in negotiated resolutions.

The Eleventh Circuit addressed this issue in its 2014 decision in *U.S. v. Esquenazi*,⁵ and the Second Edition incorporates the court's definition of “instrumentality” – *i.e.*, “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own” – as well as the list of non-exhaustive factors the Eleventh Circuit outlined to aid in the fact-specific analysis of whether a particular entity meets that definition.

As with so many concepts in the FCPA space, the *Esquenazi* definition, and in particular the factors used to support an instrumentality analysis, is subject to considerable discretion, particularly when addressed in the context of a negotiated resolution. Therefore, the inclusion of the *Esquenazi* definition and factors in the Second Edition should not portend a shift in the approach of DOJ or the SEC. However, while courts in several circuits have approved in jury instructions non-exhaustive factors similar to those from *Esquenazi*, not all of them have

³ 137 S. Ct. 1635 (2017).

⁴ No. 18–1501, 2020 WL 3405845 (U.S. June 22, 2020).

⁵ 752 F.3d 912, 925 (11th Cir. 2014).

adopted the factors for all purposes, let alone the definition. Thus, the incorporation of the *Esquenazi* definition and related factors in the Second Edition may serve as a useful reference point in negotiations with DOJ and the SEC in matters not otherwise tethered to the Eleventh Circuit or other circuits that have adopted some basis for crediting the *Esquenazi* definition or factors.

6. The Second Edition's Additional Hallmark of an Effective Compliance Program Reflects DOJ Compliance Program Guidance

The Second Edition's hallmarks of an effective compliance program remain largely unedited, with the exception of the addition of a new hallmark: Investigation, Analysis, and Remediation of Misconduct. Rather than creating new compliance expectations for companies, this newest hallmark tracks DOJ's guidance on the Evaluation of Corporate Compliance Programs, combining into one hallmark the "Investigation of Misconduct" and "Analysis and Remediation of Any Underlying Misconduct" sections of DOJ's guidance. The Second Edition reminds companies that an effective compliance program must have a "well-functioning and appropriately funded mechanism" to timely and thoroughly investigate allegations and an established way of documenting the company's disciplinary and remedial measures taken in response. Finally, the company should analyze the root cause of misconduct in order to integrate lessons learned into the compliance program.

In addition to the hallmarks, the Second Edition updates the section on "Other Guidance and Compliance Program Best Practices," adding references to DOJ's Evaluation of Corporate Compliance Programs guidance and a few additional resources from inter-governmental and non-governmental organizations. Notably, the International Standards Organization's ("ISO") anti-bribery management system standard – first published in 2016 – is not on the list of updated resources, perhaps suggesting, as we have previously [noted](#), that DOJ and the SEC place little weight on this ISO certification when evaluating compliance programs.

7. The Second Edition Reinforces a Narrow View of the Local Law Defense

The so-called "local law defense" to the FCPA has long been recognized as a narrow one.⁶ The Second Edition highlights the many limitations of this defense, including that "[i]n practice" the defense "arises infrequently," "as the written laws and regulations of countries rarely, if ever, permit corrupt payments." The Second Edition bolsters the position of DOJ and the SEC on the limited nature of the defense with reference to *United States v. Ng Lap Seng*.⁷ While *Lap Seng* has garnered much [attention](#) for the Second Circuit's holding on the lack of an "official act" requirement under the FCPA, it is the district court's decision on the local law defense that is highlighted in the Second Edition. In particular, the Second Edition notes the district court's rejection of the defendant's requested jury instruction that the jury must acquit if the payments at issue were lawful under the written laws and regulations in the relevant foreign countries. The district court found that such an instruction would be "inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA."⁸ In

⁶ 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

⁷ Jury Instructions at 4249–62, No. 15-cr-706 (S.D.N.Y. July 26, 2017).

⁸ *Id.* at Trial Transcript 715–18.

other words, it would appear that DOJ will continue to reject any attempt to invoke the local law defense in the absence of explicit approval of corrupt payments in written local laws and regulations.

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